

STATE OF MICHIGAN
COURT OF APPEALS

OLUGBENGA MEJABI,

Plaintiff-Appellant,

v

WAYNE STATE UNIVERSITY, BOARD OF
REGENTS FOR STATE OF MICHIGAN, and
DR. KENNETH CHELST,

Defendants-Appellees.

UNPUBLISHED

August 19, 2010

No. 290535

Wayne Circuit Court

LC No. 07-732972-NO

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals as of right the order dismissing his action as a sanction for failure to comply with the trial court's discovery orders. We affirm.

I. FACTS AND PROCEEDINGS

Plaintiff, an associate professor at Wayne State University, filed this action alleging claims for employment discrimination under the Michigan Elliott-Larsen civil rights act, MCL 37.2101 *et seq.*, and common-law claims for intentional infliction of emotional distress, defamation, negligence, and tortious interference with a business relationship. Plaintiff alleged that defendants subjected him to intimidation and harassment on the basis of his race, wrongfully removed him from the Engineering Management Masters Program, incited students to complain about his performance, and "conspired behind the scenes to brand [him] a 'low performer' despite all evidence to the contrary." During discovery, defendants requested various records and information concerning plaintiff's involvement with Simplex Systems, Inc. ("Simplex"), a consulting corporation wholly owned by plaintiff. Defendants maintained that the records were relevant to establish whether plaintiff violated Wayne State University's policy limiting faculty members to an average of eight hours a week on outside consulting activities, and to show whether plaintiff's consulting activities affected his teaching performance at the university.

Plaintiff produced Simplex's tax returns in response to defendants' first request for production of documents, but he failed to comply with defendants' requests to produce additional documents concerning Simplex's activities. The trial court ordered plaintiff to produce the requested documents, or to certify their non-existence, in three separate orders, entered on June 19, 2008, September 19, 2008, and November 7, 2008, respectively. The last order specifically

required plaintiff to produce Simplex's 1099 forms, the existence of which plaintiff had previously acknowledged during his deposition. Plaintiff failed to produce the requested documents and instead stated that the information sought by defendants could be found in the tax returns that he had previously produced. At the hearing on defendants' motion to dismiss,¹ plaintiff stated that defendants could obtain the 1099 forms from his accountant. The trial court dismissed plaintiff's action as a sanction for his repeated discovery violations. Plaintiff's motion for reconsideration was also denied.

II. DISMISSAL AS A SANCTION FOR A DISCOVERY VIOLATION

Plaintiff argues that the trial court erred by finding that he violated the discovery orders. He further argues that, even if there was a discovery violation, the trial court erred by imposing the severe sanction of dismissal. We find no error.

The trial court's findings of fact in a discovery dispute are reviewed for clear error. *Traxler v Ford Motor Co*, 227 Mich App 276; 282; 576 NW2d 398 (1998). A trial court's decision whether to impose discovery sanctions is reviewed for an abuse of discretion. *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 147; 683 NW2d 745 (2004). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Plaintiff first argues that there was no discovery violation because he produced Simplex's tax returns and certified that no other documents existed. We find no merit to this argument. The trial court's November 7, 2008, order specifically required plaintiff to "identify all entities for whom he has provided consulting services in the past five years and completely answer the Interrogatory regarding the nature of services provided, hours spent, monies earned, name of entity or person, and address." The order also required plaintiff to "provide records of earnings from sources other than Wayne State such as 1099s or cancelled checks including records of personal earnings from Simplex other than the tax returns already provided." Plaintiff was ordered to "produce all financial documents for Simplex Systems, Inc., including 1099s issued, bank statements, cancelled checks, or documents reflecting amounts earned by Simplex other than those documents already produced." The order provided that if plaintiff did not have a requested document, "[p]laintiff shall certify that no documents exist."

Plaintiff contends that he satisfied the certification requirement in his response to the November 7, 2008, discovery order. In that response, under the heading "Request for Production No. 7" ("all federal and state tax returns for Simplex Systems, Inc., for the last seven (7) years"), plaintiff wrote, "All such financial information is contained in the tax returns previously provided to [d]efendants' counsel." Plaintiff contends that this response was the equivalent of a certification that no such documents existed, thereby complying with the trial court's November 7, 2008, order. Plaintiff also stated in his response that all of his earnings from sources other than his employment with defendants were disclosed on tax documents previously provided.

¹ This was defendants' third motion to dismiss. The prior two motions resulted in orders compelling plaintiff to comply with the discovery requests in lieu of dismissal.

We reject plaintiff's attempt to characterize his response as a certification that the requested documents did not exist. The response merely indicated that the information defendants sought was contained in documents that were previously produced; it was not a statement that the requested documents did not exist. The statement reflected a continuation of plaintiff's attempt to evade the trial court's order by declaring that the order compelling production of documents was unnecessary because plaintiff believed that defendants could obtain the information they sought from other sources. Further, the response did not address the 1099 forms and bank statements that were specifically required by the trial court's order. Moreover, plaintiff previously admitted the existence of the 1099 forms during his deposition. He also acknowledged their existence to the trial court when he stated at the hearing that his accountant had possession of the documents. Under these circumstances, the trial court did not clearly err by finding that plaintiff failed to comply with the court's discovery orders.

Plaintiff also argues that, even if he did violate the discovery orders, the trial court abused its discretion by ordering the severe sanction of dismissal. We disagree.

MCR 2.313(B) authorizes a court to sanction a party for failure to comply with a discovery order. The rule provides, in pertinent part:

(2) If a party . . . fails to obey an order to provide or permit discovery, including an order entered under subrule (A) . . . the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:

(a) an order that the matters regarding which the order was entered or other designated facts may be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;

(c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party;

(d) in lieu of or in addition to the foregoing orders, an order treating as contempt of court the failure to obey an order, except an order to submit to a physical or mental examination[.]

Thus, the sanction of dismissal is specifically authorized by MCR 2.313(B)(2)(c). Certainly dismissal is the harshest sanction available and is warranted only in extreme cases. *Schell v Baker Furniture Co*, 232 Mich App 470, 475; 591 NW2d 349 (1998), *aff'd* 461 Mich 502 (2000). Thus, a court should impose the drastic sanction of dismissal only "where there has been a flagrant and wanton refusal to facilitate discovery, and where the failure has been conscious or intentional, rather than accidental or involuntary." *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992); see also *Traxler*, 227 Mich App at 286.

In *Bass v Combs*, 238 Mich App 16, 26-27; 604 NW2d 727 (1999), overruled on other grounds in *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008), this Court, quoting *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990), observed that a trial court should consider the following factors when determining an appropriate sanction for a discovery violation:

“(1) [W]hether the violation was wilful or accidental; (2) the party’s history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice; (5) whether there exists a history of [the party’s] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court’s order; (7) an attempt by the [party] to timely cure the defect[;] and (8) whether a lesser sanction would better serve the interests of justice.”

Although the trial court did not specifically address each of these factors before dismissing plaintiff’s action, the record clearly establishes that plaintiff’s discovery violations were willful, that plaintiff had a history of previous discovery violations, and that the trial court had given plaintiff previous opportunities to cure the discovery defects before imposing the sanction of dismissal.

Plaintiff refused to produce any records or documents pertaining to Simplex’s business activities other than the earlier tax returns. Plaintiff acknowledged the existence of other documents, including the 1099 forms, but stated in his response to the November 9, 2008, discovery order that defendants could obtain the relevant information from the tax returns. He then suggested at the hearing on the motion to dismiss that defendants could obtain various documents by issuing a subpoena to his accountant. Plaintiff thereafter changed his position in his motion for reconsideration, as he does on appeal, by maintaining that his previous denials should be construed as a certification that the requested documents did not exist. Plaintiff was evasive in other respects as well. For example, when asked to identify clients for whom he had performed consulting work, he merely stated that he performed consulting work for Simplex, thus evading the question of the clients for whom he performed the work. These circumstances clearly reveal a deliberate and willful attempt by plaintiff to avoid compliance with discovery.

Furthermore, the evidence clearly established a history of refusing to comply with discovery and engaging in deliberate delay. The trial court issued three separate orders compelling discovery due to plaintiff’s repeated failure to comply with discovery requests. Defendants were prejudiced by the discovery violations because the missing documents prevented them from learning the full extent of plaintiff’s consulting activities, which defendants maintained affected his teaching performance at the university and explained his poor evaluations. Moreover, the trial court had previously considered lesser sanctions when considering prior motions related to plaintiff’s discovery violations. The court denied two prior requests for dismissal. The sanction of dismissal was ordered only after plaintiff repeatedly failed to comply with the court’s discovery orders. Under these circumstances, the trial court did not abuse its discretion in dismissing this case because of plaintiff’s failure to comply with discovery.

III. JUDICIAL DISQUALIFICATION

Plaintiff also seeks relief on the ground that the trial court was biased against him. Plaintiff did not preserve this issue by moving to disqualify the trial judge below. Therefore, our review is limited to plain error affecting plaintiff's substantial rights. *Wolford v Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008).

At the time the trial court dismissed this action, MCR 2.003(B)(1) provided that "a judge is disqualified when the judge cannot impartially hear a case," including when the "judge is personally biased or prejudiced for or against a party or attorney." To overcome the presumption of judicial impartiality, a showing of actual bias was required. *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009). However, MCR 2.003 was recently amended, effective November 25, 2009, see 485 Mich civ (2009), to incorporate an "appearance of impropriety" standard as a ground for disqualification. MCR 2.003(C)(b) now provides that disqualification is warranted if a judge, "based on objective and reasonable perceptions . . . has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." Plaintiff urges this Court to apply the broader "appearance of impropriety" standard for evaluating his claim of judicial bias.

Assuming, without deciding, that it would be appropriate to apply the "appearance of impropriety" standard in reviewing plaintiff's claim, no basis for relief is apparent. Plaintiff relies solely on the trial court's adverse rulings to support his claim that the trial court was prejudiced against him. As explained in *In re Contempt of Henry*, 282 Mich App at 679:

The mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 554; 730 NW2d 481 (2007). "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a "deep-seated favoritism or antagonism that would make fair judgment impossible" and overcomes a heavy presumption of judicial impartiality." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001) (citations omitted).

Although these statements were made in the context of discussing the "actual bias" standard in former MCR 2.003(B)(1), adverse rulings, standing alone, likewise do not serve as "objective and reasonable perceptions" that a judge "has failed to adhere to the appearance of impropriety standards set forth in Canon 2^[2] of the Michigan Code of Judicial Conduct."

² Canon 2 of the Code of Judicial Conduct requires a judge to "accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." Canon 2 also requires a judge to "promote public confidence in the integrity and impartiality of the judiciary," to avoid family, social, and other personal relationships to influence judicial conduct or judgment, and to avoid allowing organizational memberships "to cast doubt on the judge's ability to perform the function of the office in a manner consistent with the Michigan (continued...)

As indicated previously, the trial court here gave plaintiff several opportunities to cure his discovery violations before ordering the sanction of dismissal, and that sanction was justified under the circumstances. Further, the trial court's denial of plaintiff's motions to compel defendant Chelst's deposition do not reflect favoritism for defendants. The court did not prohibit plaintiff from taking Chelst's deposition; it merely required that plaintiff first be deposed by defendants. In sum, the record does not support plaintiff's unpreserved argument that the trial court was biased against him, or that disqualification was warranted under a lesser appearance of impropriety standard.

IV. MRPC 3.3(a)(3)

Finally, plaintiff argues that reversal is required because defendants violated MRPC 3.3(a)(3), which provides that an attorney shall not knowingly "fail to disclose to a tribunal controlling legal authority in the jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Plaintiff argues that defendants violated this rule because they cited *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994), a case involving the entry of a default judgment against a defendant as a sanction for a defendant's discovery violation, instead of citing *Bass*, 238 Mich App at 26-27, or *Dean*, 182 Mich App at 32-33, which, like this case, involved entry of an order of dismissal against a plaintiff as a sanction for the plaintiff's discovery violation. Even if we agree that it would have been more appropriate to cite *Bass* or *Dean*, defendants' citation of *Mink* did not amount to a material failure to disclose controlling legal authority, and neither *Bass* nor *Dean* are directly adverse to defendants' position. As previously explained, consideration of the factors set forth in *Bass* and *Dean* support the trial court's decision to impose the sanction of dismissal. Accordingly, we reject this claim of error.

We affirm. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

(...continued)

Code of Judicial Conduct, the laws of this state, and the Michigan and United States Constitutions."